IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-246

ERNEST TURLEY,

Petitioner,

v.

DONALD WYRICK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The petitioner, Ernest Turley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on April 14, 1977, rehearing denied on May 16, 1977, affirming the dismissal of a habeas corpus petition and rejecting the petitioner's claims that a state conviction, based upon an offense for which he had previously been acquitted in federal court, violated the ban against Double Jeopardy.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 554 F.2d 840, and is set out in the Appendix, infra, at pp. 1a-14a. The opinion of the United States District Court for the Eastern District of Missouri is reported at 415 F.Supp. 87, and is set forth in the Appendix, infra, at pp. 16a-19a. The opinion of the Missouri Court of Appeals, St. Louis District, affirming the petitioner's conviction on direct appeal, is reported at 518 S.W.2d 207, and is set forth in the Appendix, infra, at pp. 21a-36a.

Jurisdiction

The judgment and per curiam opinion of the United States Court of Appeals sought to be reviewed was entered on April 14, 1977, with Circuit Judge Lay filing a concurring opinion. An order denying a petition for rehearing was entered on May 16, 1977, stating that Circuit Judge Heaney would have granted rehearing, and that Circuit Judge Bright agreed with the views expressed in Judge Lay's concurring opinion. The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. §1254(1).

Questions Presented

1. Whether the Double Jeopardy clause of the Fifth Amendment prevents prosecution of a defendant by a State after he has been acquitted in a trial for the same offense in a federal court, and, if so, whether Bartkus v. Illinois, 359 U.S. 121 (1959) should be reconsidered?

2. If the answer to Question No. 1 is negative, does the Double Jeopardy clause nevertheless prevent such a prosecution by virtue of the doctrine of collateral estoppel where the two governments are in privity through identity of interest in the respective prosecutions, and, if so, were the United States and Missouri in such privity here in successive federal and state prosecutions for the alleged armed robbery by petitioner of a state bank insured by the Federal Deposit Insurance Corporation?

3. Where a defendant has been acquitted of bank robbery in a federal court and then convicted for the same bank robbery in a state court, is it required as a condition for applying the doctrine of collateral estoppel that the transcript of the first or the second trial or both be examined to determine the issues decided?

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (emphasis added)

Title 18, United States Code, Sections 2113(a), (d), and (f), as they were in effect on June 11, 1970, the date of the robbery involved herein, provided as follows:

> Bank Robbery and incidental crimes
>
> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take from the person

> or presence of another, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny--
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

* * *

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

* * *

Section 560.120, Revised Statutes of Missouri, Vol. 4, p. 4083, provides as follows:

Robbery in the first degree

Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or

her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Section 560.135, Revised Statutes of Missouri, Vol. 4, p. 4084, as it was in effect on June 11, 1970, the date of the robbery involved herein, provided as follows:

Robbery by means of dangerous and deadly weapons--penalty

Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon shall suffer death, or be punished by imprisonment in the penitentiary for not less than five years, and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment in the penitentiary for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment in the penitentiary not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment in the penitentiary not exceeding five years.

STATEMENT OF THE CASE

This is a proceeding for habeas corpus relief filed on behalf of a Missouri state prisoner who was convicted in a state court of bank robbery after his acquittal in a federal court on an indictment for the same robbery. The petitioner contends that this Missouri conviction violates the double jeopardy clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment in Benton v. Maryland, 395 U.S. 784 (1969), and as construed in Ashe v. Swenson, 397 U.S. 436 (1970).

The relevant facts are as follows.

On July 1, 1970, petitioner and one Clarence Edward Haynes were indicted in the United States District Court for the Eastern District of Missouri, Eastern Division, on a charge of robbery, by use of a dangerous weapon, of the Laddonia State Bank in Missouri on June 11, 1970, in violation of 18 U.S.C. Section 2113(a) and (d). The bank had been robbed by two armed robbers wearing stocking masks, and the sole issue at the trial in federal district court was whether the petitioner was one of the two robbers. There was conflicting testimony and evidence on the issue. The jury returned a verdict of not guilty, and a judgment of acquittal was entered in petitioner's favor on November 23, 1970.

Thereafter, on January 4, 1971, the Prosecuting Attorney of Audrain County, Missouri, filed an information, later transferred on change of venue to the Missouri Circuit Court for Warren County, charging petitioner with the same armed robbery of the Laddonia State Bank, of which he had been acquitted in the federal court. The charge was robbery in the first degree by means of a dangerous and deadly weapon, under R. S. Mo. Sections 560.120 and 560.135.

The federal and state indictments were substantially identical, except that the federal indictment alleged that the deposits in the bank were insured by the Federal Deposit Insurance Corporation, the basis for federal jurisdiction, and the state information additionally charged the petitioner with prior convictions under R. S. Mo. Section 556.280. This latter charge did not involve the imposition of enhanced punishment. Rather, this Missouri "second offense" statute is merely a procedural device, whereby, if a person is convicted of having committed a second or subsequent offense, then sentencing is by the judge rather than the jury.

On January 15, 1971, petitioner filed a motion to dismiss the charge pending in the Missouri Circuit Court on the grounds of double jeopardy and collateral estoppel. (T. 12, 14). */ The motion was overruled on February 1, 1971, and the case was placed on the trial calendar. Petitioner then sought a writ of prohibition on these grounds which was denied by the Supreme Court of Missouri on May 10, 1971. (T. 18). This Court denied certiorari on January 10, 1972. Turley v. Adams, 404 U.S. 1024 (1972).

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*/ "T. ____" refers to the transcript of the state trial, which was made part of the record in the proceedings below.

In March 1972, over his renewed objection, petitioner was tried in the state court on the bank robbery charge. The trial was virtually a rerun of the previous trial in the federal court. (App., infra, pp. 9a, 23a). The evidence showed that the two robbers wore stocking masks, so that any identification of them was more difficult. (T. 54, 62-63). There was testimony from bank employees that the petitioner was one of the two bank robbers, and further testimony that Turley had allegedly been seen in Laddonia the day before the robbery driving a car thought to be the same as that used later for the getaway. (T. 100). However, there was a strong alibi defense consisting of detailed evidence placing Turley in St. Louis at all the critical times of the day of the robbery and the day before. Some of that testimony came from an Internal Revenue Agent, and some from witnesses hostile to Turley, and it was corroborated by documentary evidence. (T. 209-210, 211, 213, 214, 215-216, 217-218, 226, 229-234, 240, 248-251, 256-258, 263-269, 274-275, 352-354). Nevertheless, the state court jury returned a guilty verdict on March 30, 1972. Thereafter, the petitioner was sentenced to twenty years' imprisonment.

The Missouri Court of Appeals, St. Louis District, upheld petitioner's conviction for armed robbery despite his renewed assertion that the double jeopardy clause and the prin-

ciples of collateral estoppel proscribed his prosecution by the State of Missouri. State v. Turley, 518 S.W.2d 207; (App., infra, pp. 21a-36a). The Supreme Court of Missouri summarily denied petitioner's motion to transfer the cause to that court, and this Court denied certiorari. Turley v. Missouri, 421 U.S. 966 (1975).

Petitioner then filed this petition for a writ of habeas corpus on February 18, 1976, in the United States District Court for the Eastern District of Missouri, pursuant to 28 U.S.C. §§ 2241 et seq. 1/ The respondent warden filed his response on March 18, 1976, attaching, among other things, the transcript of the state trial, but not of the federal trial. On April 5, 1976, before petitioner filed his traverse or other pleadings or memoranda, the District Court entered its Memorandum and Order dismissing the petition. (App. infra, pp. 16a-19a). A motion for a new trial was denied on May 12, 1976, and a certificate of probable cause was issued on June 10, 1976.

On appeal, considered without oral argument, the Eighth Circuit affirmed the denial of habeas corpus relief in a per curiam opinion. The Court of Appeals held that there was nothing in this Court's decisions since

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1/ It is conceded that state court remedies had been properly exhausted. (App. infra, p. 17a).

1959 "that casts a shadow on the validity of the dual sovereignty doctrine enunciated in Bartkus and Abbate." (App., infra, p. 4a). The court did not explicitly pass upon petitioner's claim that the collateral estoppel doctrine reaches two different sovereigns where there is privity through an identity of interests, but the court did hold that "the collateral estoppel doctrine does not apply when different sovereigns and, thus, different parties are involved in the litigation." (App., infra, p. 5a). The court also rejected the petitioner's collateral estoppel argument on the ground that the petitioner had the burden of proving that the relevant issues were resolved in his favor at the previous trial, and that petitioner had not met that burden because he failed to introduce a transcript of his federal trial in support of his motion to dismiss the state charges. (App. infra, p. 6a).

Circuit Judge Lay wrote a concurring opinion in which he indicated that he felt bound by opinions in the Eight Circuit and elsewhere construing Bartkus v. Illinois, 359 U.S. 121 (1959), and Abbate v. United States, 359 U.S. 187 (1959), as barring a double jeopardy claim under the dual sovereignty doctrine. However, he was "not convinced that subsequent decisions of the Supreme Court have not fully eroded Bartkus and Abbate..." (App., infra, p. 7a). After carefully analyzing the issues, he concluded with the following observation:

> As an intermediate appellate judge I realize that it is not my singular role to express opinion contrary to established law. However, recognition of this judicial discipline should not prevent one from expressing dismay in the use of stare decisis to perpetuate an injustice. (App., infra, p. 14a).

On April 28, 1977, petitioner filed a timely petition for rehearing and suggestion for rehearing en banc. This petition was denied, with Circuit Judge Heaney dissenting and Circuit Judge Bright expressing agreement with the concurring opinion. (App., infra, p. 15a).

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the current validity and proper reach of the "dual sovereignty" doctrine of Bartkus v. Illinois, 359 U.S. 121 (1959). The first issue is whether the underpinnings of the doctrine have been so eroded by subsequent decisions that the Court should reconsider the continued vitality of that doctrine.

The second issue is a more narrow one, namely, whether there should be an exception to the dual sovereignties rule where the interests of the state government in the subsequent prosecution are substantially the

same as those underlying the federal statutes pursuant to which a defendant has been tried. The exception that we suggest follows directly from the doctrine of collateral estoppel which this Court has held to be an essential aspect of the Fifth Amendment's double jeopardy clause. See Ashe v. Swenson, 397 U.S. 436 (1970). Recognition of such an exception would remedy the injustices perpetuated by Bartkus' blanket approval of successive federal-state prosecutions while protecting the states' legitimate claims to prosecutorial independence. Indeed, nineteen states already have erected general statutory bars against successive federal and state prosecutorial for the same offense, an indication that the rule for which petitioner contends would not undermine the states' law enforcement processes. [2] In addition, the Department of Justice has a policy against

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[2] Alaska Stat. §12.20.010 (1962); Ariz.Rev. Stat. §13-146 (1956); Cal. Penal Code §656 (1965); Idaho Code Ann. §19-315 (1947); Ill. Ann.Stat. Ch. 38, §3-4 (1961); Ind. Ann.Stat. §9-215 (1956); Minn. Stat.Ann. §609.045 (1963); Miss. Code Ann. §2432 (1956); Mont.Rev.Code §95-1711(4) (1973); Nev.Rev.Stat. §171.070 (1963); N.Y. Code Crim.Proc. §139 (1958); N.D. Cent.Code §29-03-13 (1960); Okla.Stat.Ann.Tit. 21 §25 (1951); Ore.Rev.Stat. §131.240 (1965); S.D. Comp.Laws §22-5-8 (1967); Tex. Code Crim. Proc.Art. 13.23 (1966); Utah Code Ann. §76-1-25 (1953); Wash. Rev.Code Ann. §10.43.040 (1961); Wis. Stat.Ann. §939.71 (1958).

successive state-federal prosecutions based on the same transaction unless a compelling federal interest is involved. See United States v. Petite, 361 U.S. 529, 530 (1960).

Finally, the stark facts of this case present an appropriate context for the Court to consider these issues. The federal authorities prosecuted the petitioner for the robbery of the bank, but were unable to persuade the jury which found the petitioner not guilty. The state officials then tried their hand, with the same witnesses, the same testimony, and the same evidence, but this time with success. As Circuit Judge Lay observed below: "The facts are significant here; they eloquently plead the petitioner's case. They serve to demonstrate the fallacy in barring the claim of double jeopardy under the dual sovereignty doctrine." (App., infra, p. 8a).

1. This Court should decide whether Bartkus v. Illinois, 359 U.S. 121 (1959), permitting successive prosecutions for the same offense by federal and state governments, has been so eroded by subsequent decisions of this Court that its continued authority must be reconsidered.

In 1959, this Court held, in a five-to-four decision, that an acquittal on a prior federal charge of bank robbery would not prohibit a state court from trying the defendant for a state offense arising from those identical facts. Bartkus v. Illinois,

359 U.S. 121 (1959). The majority opinion of Mr. Justice Frankfurter relied on the rule of Palko v. Connecticut, 302 U.S. 319 (1937), that the double jeopardy proscription of the Fifth Amendment did not apply to the States, reasoned that "the claim of unconstitutionality must rest upon the due process clause of the Fourteenth Amendment," 359 U.S. at 123, 124, and concluded that the successive prosecutions in federal and state courts did not deprive the petitioner of due process of law.

But in Benton v. Maryland, 395 U.S. 784 (1969), which involved successive prosecutions in state court, this Court overruled Palko and held that the Fifth Amendment's double jeopardy clause applies directly to the states, and prohibited such prosecutions. Benton thus undermined a primary underpinning of the Bartkus dual sovereignty doctrine. 3/

3/ Indeed, the doctrine had previously been somewhat eroded by the demise of other state "exemptions" which turned on a dual sovereignty notion, for example, the "silver platter" doctrine overturned in Elkins v. United States, 364 U.S. 206 (1960), and the holding in Murphy v. Waterfront Commission, 378 U.S. 52, 77-78 (1964), that the constitutional privilege against self-incrimination protects a state witness under federal law and a federal witness under state law. Such decisions prompted Mr. Justice Harlan and Mr. Justice Stewart to observe that the "two sovereignties" concept had effectively been abolished. See Stevens v. Marks, 383 U.S. 234, 250 (1966) (concurring opinion).

In 1970, after Benton, this Court abolished the dual sovereignty distinction between municipalities and states, noting that the distinction had become an anachronism. Waller v. Florida, 397 U.S. 387 (1970). Based on such decisions, numerous scholars have severely criticized the Bartkus doctrine, and urged that it be reconsidered. 4/ Althugh the issue has frequently been tendered to this Court, certiorari has consistently been denied. See, e.g., United States v. Jackson, 470 F.2d 684 (5th Cir.), cert. denied, 412 U.S. 951 (1973); Martin v. Rose, 481 F.2d

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4/ See, Schaefer, Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe, 58 Calif. L.Rev. 391, 500-401 (1970); Pontikes, Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Illinois and Abbate v. United States, 14 W.Res.L.Rev. 700 (1963); Franck, An International Lawyer Looks at the Bartkus Rule, 34 N.Y.U.L.Rev. 1096 (1959); Note, 80 Harv.L.Rev. 1538 (1967); Note, 44 Minn.L.Rev. 534 (1960); Note, 45 Cornell L.O. 574 (1960); see also Grant, Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons, 4 U.C.L.A.L.Rev. 1 (1956).

658 (6th Cir.), cert. denied, 414 U.S. 876 (1973); United States v. Johnson, 516 F.2d 209 (8th Cir.), cert. denied, 423 U.S. 859 (1975).

Despite these criticisms of the dual sovereignty doctrine, there is one possible "practical justification" for permitting successive trials for the same crime. See Bartkus v. Illinois, supra, 359 U.S. at 136-37. Referring to Screws v. United States, 325 U.S. 91 (1945), Mr. Justice Frankfurter argued that the imposition by the federal courts of the minor punishments permitted by the civil rights statutes at issue in Screws would preclude the state trial of grave offenses including murder, unless the dual sovereignty doctrine is preserved. But the civil rights statutes were enacted because of apprehension that the states would not prosecute cases in which racial discrimination had shaped the crime. Absent a dual sovereignty rule, the more likely danger is, not that the federal authorities would block the state, but rather that federal prosecution would be blocked by an unwarranted state acquittal or a token state punishment of a state official who had violated a person's constitutional rights. This suggests that there might be areas where the interests of the United States and of the several states are substantially different, and some accomodation to such interests might be required. But in the great bulk of cases of overlapping jurisdiction, however, the federal and state interests are substantially identical, as

here, and to permit successive prosecutions in those cases is to present criminal defendants with a cruel mockery of the spirit behind the double jeopardy clause.

2. This Court should determine whether, even if Bartkus still permits some successive federal-state prosecutions for the same offense, such prosecutions are barred by the collateral estoppel doctrine of Ashe v. Swenson, 397 U.S. 436 (1970), where such governments are in privity by virtue of having the same interest in the prosecutions.

A total overruling of Bartkus might create the dilemma of possible interference between state and federal governments in pursuing their respective interests in prosecution, as against the inequity of permitting both to prosecute a defendant for the same offense. The solution to this dilemma is to forbid successive prosecutions where state and federal interests are substantially identical.

This is exactly what was done by the Supreme Court of Pennsylvania in Commonwealth v. Mills, 447 Pa. 168, 286 A.2d 638 (Pa. 1971). After concluding that Bartkus still controlled the federal constitutional issue, that court nevertheless ruled, on public policy grounds, that "a second prosecution and imposition of punishment for the same offense will not be permitted unless it

appears from the record that the interests of the Commonwealth of Pennsylvania and the jurisdiction which initially prosecuted and imposed punishment are substantially different." 286 A.2d at 642. The defendant there had pleaded guilty in federal court to bank robbery and assault; the Pennsylvania court reversed his state conviction for firearms offenses and assault, based on the same acts as those federally prosecuted, because it found no reason to believe that the interests of Pennsylvania had not been fully protected by the federal prosecution. 5/

In another federal-state prosecutions case involving a federally insured state bank, the Supreme Court of Michigan also embraced an "interests analysis" approach. People v. Cooper, ___ Mich. ___, 247 N.W.2d 866 (Mich. 1976). The Cooper court held that the approach was required by the state constitution's guarantee against double jeopardy.

5/ It should be noted that in Commonwealth v. Studebaker, ___ Pa. ___, 362 A.2d 336 (1976), the Supreme Court of Pennsylvania recently held that the Mills "interest analysis" did not apply where the successive federal-state trials are for separate and distinct offenses, namely, arson and mail fraud, the latter involving a special federal interest. The Court also declined, as it had in Mills, to extend the collateral estoppel doctrine of Ashe v. Swenson, to different "parties."

In his concurring opinion below, Judge Lay quoted the Cooper test and found it "determinative" of the substantive issue here. The test is as follows:

> Whether the maximum penalties of the statutes involved are greatly disparite, whether some reasons exist why one jurisdiction cannot be entrusted to vindicate fully another jurisdiction's interest in securing a conviction, and whether the differences in the statutes are merely jurisdictional or are more substantive.
> 247 N.W.2d at 871.

The courts in Mills and Cooper based their "interests analysis" approach on grounds other than the double jeopardy clause of the federal Constitution. But the logic of such approach is identical to that of the concept of privity, and privity, in turn, is a well-established and developed aspect of collateral estoppel.

In Ashe v. Swenson, 397 U.S. 436 (1970), this Court determined that the doctrine of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy. The Court noted that, "(a)lthough first developed in civil litigation," collateral estoppel had long been an "established rule of federal criminal law." The primary innovation of Ashe was to give the doctrine constitutional status, and that aspect of the ruling is crucial to this case.

Ashe defines collateral estoppel as follows: "...when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443. The Ashe Court referred to "the same parties" because they were the same in the case before it. The question here is whether the full definition should include privies of the parties in litigation in a manner so that the United States and Missouri, as successive parties to the prosecutions of petitioner, were in such privity that the doctrine of collateral estoppel applies.

The meaning of privity in civil litigation is well-established. The Restatement of Judgments, §83 (1942) defines the word privy to include "those who control an action although not parties to it; [and] those whose interests are represented by a party to the action..." Regarding states as parties the Restatement, §78d, declares that the rules of res judicata and collateral estoppel "apply with reference to them as in the case of private persons."

The Restatement of Judgments does not deal with the effects of criminal judgments. In criminal cases in which it has figured, however, the concept of "privity" - like other aspects of collateral estoppel - has derived its meaning from older usages in civil litigation. "Privy" in the Restatement's first sense, "those who control an

action although not parties to it," is already a firmly established notion in federal double jeopardy law. See, e.g., Bartkus v. Illinois, supra, 359 U.S. at 123-124. In this case, the federal government, acting through the F.B.I., developed the case against the petitioner, and, after he was acquitted in federal court, it handed over its evidence and witnesses to the State prosecutors. (App. infra, pp. 8a-9a, 21a-23a). While this suggests that the federal government had a great deal to do with the State prosecution, it cannot necessarily be concluded that it controlled that prosecution. Cf., Ferina v. United States, 340 F.2d 837 (8th Cir. 1965). Thus, privity between the two governments must also be sought in the identity of their interests.

The second meaning of "privy" in the Restatement - that of an identity of interests - has also frequently figured in criminal litigation. In United States v. Sutton, 245 F.Supp. 357 (D. Md. 1965), aff'd, 363 F.2d 845 (4th Cir. 1966), cert. denied, 385 U.S. 1014 (1967), for example, the court applied a collateral estoppel analysis in terms of the identity of interest of the state and federal governments, but concluded that the respective governmental interests were separate. Similarly, in United States v. Feinberg, 383 F.2d 60 (2d Cir. 1967), the court applied the analysis, but again found the two governments to have interests which were separate and distinct. In both cases, the protection of interstate commerce was the distinctive federal interest which was real and immediate.

Here, however, the federal jurisdiction to protect banks having a federal connection does not rest on the commerce power; it stems, instead, from the "necessary and proper" clause, as related to the power to coin money and to borrow on the credit of the United States. Hudspeth v. Melville, 127 F.2d 363, 375 (10th Cir. 1942). No one has ever suggested that that power displaces or changes the states' interest in banking.

Petitioner was first tried in federal court for the robbery of the Laddonia State Bank because its deposits were insured by the Federal Deposit Insurance Corporation. The federal government exercises authority through the F.D.I.C., comparable to state police power. Doherty v. United States, 94 F.2d 495 (8th Cir. 1938). That the bank was federally insured had nothing to do with the robbery nor with petitioner's alleged participation; at the time of the robbery it was no more than a continuing historical fact. The powers of the United States and of Missouri over the bank derived from different sources, but their interests in protecting the bank were identical. After that interest had been asserted in the federal trial, its reassertion in the state trial was nothing more nor less than a refined, better-educated attack on the defendant made after the dry run of the first trial, a practice roundly condemned as double jeopardy in Ashe v. Swenson, supra.

In Judge Lay's view, the interest of both jurisdictions was the same, namely,

"to insure the safety of persons and protect private property." (App., infra, p. 13a). The notion that the United States preserves only "the federal banking system" by protecting banks insured by the F.D.I.C. is belied by the fact that virtually every bank in America is so insured. 6/ As insurer of their deposits, the federal government was as concerned as Missouri that her citizens' money not be lost. And with regard to the respondent's argument that Missouri had a separate interest in protecting her people from violence, as Judge Lay pointed out below this contention overlooks the fact that the federal indictment included a charge under 18 U.S.C. §2113(d), referring specifically to jeopardizing life with a dangerous weapon.

Finally, in terms of the maximum penalties under the respective statutes - under the instant federal statute, §2113(d), the maximum penalty is twenty-five years imprisonment and a $10,000 fine; under the Missouri statute, Mo. Rev. Stat. §560.135, the maximum penalty available as a practical matter was life imprisonment with immediate parole eligibility. 7/

6/ Of the approximately 740 banks in Missouri in 1970, the year of the robbery, all but four were insured by the F.D.I.C.

7/ At the time of the robbery in 1970 and the state court trial in March 1972, R.S.Mo. §560.135, by its terms, provided for the death penalty for the (Continued next page)

Thus, the Court of Appeals in this case, in refusing to rule that Ashe v. Swenson requires an exception to the dual sovereignty rule with respect to those cases in which the two sovereigns are in privity through identity of interest, has either decided a federal question in a way in conflict with Ashe, or has decided an important question of federal law which has not been, but should be, settled by this Court, namely, whether Ashe does indeed so restrict the scope of Bartkus v. Illinois.

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crime charged. But the state had decided, before the trial began, to take the question of punishment away from the jury, where it normally resides in Missouri, by alleging previous convictions under R.S.Mo. §556.280, thereby putting the sentence up to the judge. Moreover, before the judge imposed the sentence in October 1972, this Court had decided Furman v. Georgia, 408 U.S. 238 (1972), and it was generally recognized in Missouri that this had the effect of invalidating the death penalty provision of R.S. §556.280.

3. The Court should determine whether, in applying the principles of collateral estoppel to a state prosecution following a federal acquittal for the same offense, it is necessary to examine the transcript of the federal trial.

As an additional ground for rejecting the petitioner's claims, and without the District Court or the respondent raising the issue, the Court of Appeals, sua sponte, held that by not introducing a copy of the transcript of the federal trial, the petitioner had failed to prove that the issues in the state trial were resolved in his favor. We would respectfully suggest that this ruling is a makeweight, since the introduction of the federal transcript would have served no useful purpose, and, in any event, the deficiency could easily have been remedied.

The federal trial transcript was unnecessary because it has never been seriously questioned that both trials were for the same bank robbery, involved virtually the same evidence, looking toward the identical issue of ultimate fact - the identity of the second bank robber. Indeed, even the account of the case in the opinion of the Missouri Court of Appeals makes plain that the federal jury must have decided that the petitioner was not one of the bank robbers, or, at the very least, that there was reasonable doubt that he was. Scrutiny of the federal transcript would have added nothing to the issues.

As this Court indicated in Ashe v. Swenson, supra, the inquiry is a "practical" one, and the purpose of examining the record is to "conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444. The particular issues in Ashe required scrutiny of the transcripts, but here it would hardly be practical to search the federal transcript to determine whether the petitioner was acquitted because the jury did not believe the bank was insured by the F.D.I.C.; yet that was the only factual issue peculiar to the federal trial.

CONCLUSION

For the reasons set forth herein, the writ of certiorari should be granted.

Respectfully submitted,

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August 1977

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*/ Counsel wish to express their appreciation to Willie Forbath, a student at the Yale Law School, for his assistance in the preparation of this petition.

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

United States Court of Appeals
For The Eighth Circuit

No. 76-1538

Ernest Turley, Appellant,	*	Appeal From the
v.	*	United States
	*	District Court for
Donald Wyrick, Appellee.	*	the Eastern District of Missouri.

Submitted: February 10, 1977
Filed: April 14, 1977

Before LAY, ROSS and WEBSTER, Circuit Judges.

PER CURIAM.

Ernest Turley appeals from the District Court's[1] denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. §2554. We affirm.

On June 11, 1970, two armed men robbed the Ladonia State Bank in Audrain County, Missouri, of approximately $13,000. On July

1 The Honorable John K. Regan, United States District Court for the Eastern District of Missouri.

1, 1970, petitioner and one Haynes were indicted by a grand jury of the United States District Court for the Eastern District of Missouri and charged with robbing the bank in violation of 18 U.S.C. §2113(a) and (d). Trial was had before a jury, which returned a verdict of not guilty on November 23, 1970.

On January 4, 1971, the prosecuting attorney of Audrain County, Missouri, filed an information charging petitioner with robbery in the first degree by means of a dangerous and deadly weapon, in violation of Mo. Rev. Stat. §§560.120 and 560.135. Petitioner moved to dismiss, alleging that his prior federal acquittal barred a subsequent prosecution arising out of the same act. The motion was overruled, and the Missouri Supreme Court denied petitioner's application for a writ of prohibition. The Supreme Court denied certiorari. Turley v. Adams, 404 U.S. 1024 (1972). On March 30, 1972, a jury found petitioner guilty of robbery in the first degree, and he was sentenced to twenty years imprisonment. The conviction was affirmed on appeal. State v. Turley, 518 S.W.2d 207 (Mo. App. 1974), cert. denied, 421 U.S. 966 (1975).

On February 18, 1976, petitioner filed a petition for a writ of habeas corpus. The District Court denied the petition. Turley v. Wyrick, 415 F.Supp. 87 (E.D. Mo. 1976). Petitioner now timely appeals and alleges three related, but distinct, grounds for

relief: (1) that the "dual sovereignty" doctrine permitting successive state and federal prosecutions for the same act has been "eroded" by subsequent decisions and should be discarded; (2) that the doctrine of collateral estoppel enunciated in Ashe v. Swenson, 397 U.S. 436 (1970), bars the state from relitigating issues decided in petitioner's favor at the prior federal trial; and (3) that the state is bound to observe the federal acquittal by virtue of the full faith and credit clause, U.S. Const., Art. IV, §1, or by virtue of 28 U.S.C. §1738.

A. "Dual Sovereignty"

It is a basic principle of federalism that successive prosecutions by the state and federal governments do not constitute double jeopardy. See Bartkus v. Illinois, 359 U.S. 121, rehearing denied, 360 U.S. 907 (1959); Abbate v. United States, 359 U.S. 187 (1959); United States v. Lanza, 260 U.S. 377 (1922). This principle is based on the concept of "dual sovereignty" -- i.e., one act may constitute separate and distinct offenses against both the state and federal governments. Thus, a defendant who is prosecuted by both the state and federal governments is not twice put in jeopardy for the same offense.

Petitioner contends that subsequent cases have eroded the dual sovereignty doctrine. He places particular reliance

upon Benton v. Maryland, 395 U.S. 784 (1969), which overruled Bartkus v. Illinois to the extent that Bartkus held that the Fifth Amendment guarantee against double jeopardy does not apply to the states. We find nothing in Benton v. Maryland, however, that casts a shadow on the validity of the dual sovereignty doctrine enunciated in Bartkus and Abbate.

Petitioner's reliance on Waller v. Florida, 397 U.S. 387 (1970); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); and Elkins v. United States, 364 U.S. 206 (1960), is similarly misplaced. None of those cases dealt with the double jeopardy issue in the context of successive federal-state prosecutions, and we find nothing in those cases which indicates that the Supreme Court no longer adheres to the dual sovereignty doctrine.

In decisions subsequent to Waller, Elkins and Murphy, this Court has consistently upheld the validity of the dual sovereignty doctrine. Sappington v. United States, 523 F.2d 858, 860 (8th Cir. 1975); United States v. Johnson, 516 F.2d 209, 212 & n.3 (8th Cir.), cert. denied, 423 U.S. 859 (1975); United States v. Delay, 500 F.2d 1360, 1362 (8th Cir. 1974); United States v. Synnes, 438 F.2d 764, 773 (8th Cir. 1971), vacated on other grounds, 404 U.S. 1009 (1972). The other circuits are in agreement. See, e.g., Martin v. Rose, 481 F.2d 658, 659-60 (6th Cir.), cert. denied, 414 U.S. 876 (1973); United States v. Jackson, 470

F.2d 684, 689 (5th Cir. 1972), cert. denied, 412 U.S. 951 (1973); United States v. Crosson, 462 F.2d 95, 103 (9th Cir.), cert. denied, 409 U.S. 1064 (1972); Goldsmith v. Cheney, 447 F.2d 624, 628 n. 3 (10th Cir. 1971). We are apprised of no reason to depart from the sound logic of these cases.

B. Collateral Estoppel

Petitioner's second contention is that the doctrine of collateral estoppel enunciated in Ashe v. Swenson, supra, barred the state's prosecution in the instant case. In Ashe, the Court held:

> [W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Id. at 443 (emphasis added). As the above-quoted language indicates, the flaw in petitioner's argument is that the collateral estoppel doctrine does not apply when different sovereigns and, thus, different parties are involved in the litigation. United States v. Johnson, supra, 516 F.2d at 211; Ferina v. United States, 340 F.2d 837, 839 (8th Cir.), cert. denied, 381 U.S. 902 (1965). See also United States v. Brown, No. 76-1335 (8th Cir., Jan. 17, 1977), slip op. at 11; United States v. Kills Plenty, 466 F.2d 240, 243 (8th Cir. 1972), cert.

denied, 410 U.S. 916 (1973).[2]

C. Full Faith and Credit

Petitioner's final contention is as unpersuasive as it is novel. He alleges that his prosecution by the State of Missouri amounted to a denial of full faith and credit to the federal judgment of acquittal. The federal judgment, however, only determined

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[2] Petitioner's collateral estoppel argument fails for yet another reason. A defendant claiming an estoppel has the burden of proving what issues were necessarily decided in his favor at his prior trial. See., e.g., United States v. Cala, 521 F.2d 605, 608 (2d Cir. 1975); United States v. Smith, 446 F.2d 200, 203 (4th Cir. 1971). In the instant case, petitioner failed to introduce a transcript of his federal trial in support of his motion to dismiss the state charge. Such failure makes it impossible for a court to ascertain the issues previously determined, and thus fails to meet the burden of proof. See, e.g., United States v. Smith, supra; United States v. Tierney, 424 F.2d 643, 645 (9th Cir.), cert. denied, 400 U.S. 850 (1970); United States v. Friedland, 391 F.2d 378, 382 (2d Cir. 1968), on remand, 316 F.Supp. 459 (S.D.N.Y. 1970), aff'd, 441 F.2d 855 (2d Cir.), cert. denied, 404 U.S. 867 (1971).

that petitioner did not violate 18 U.S.C. § 2113(a) and (d); it did not determine whether petitioner violated Mo. Rev. Stat. §§ 560.120 and 560.135. There was thus no denial of full faith and credit. The remainder of petitioner's allegation in this regard is merely a restatement of his collateral estoppel argument, discussed supra.

Having found no merit in petitioner's arguments, we affirm the order of the District Court.

LAY, Circuit Judge, Concurring.

I concur in the result reached. I am bound by the numerosity of opinions in this circuit and elsewhere, cited by Judge Webster, which construe Bartkus v. Illinois, 359 U.S. 121 (1959), and Abbate v. United States, 359 U.S. 187 (1959), as barring a double jeopardy claim under the dual sovereignty doctrine.

Upon further reflection, however, I am not convinced that subsequent decisions[1] of the Supreme Court have not fully eroded Bartkus and Abbate and that the double jeopardy defense should be sustained under the

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[1] See Benton v. Maryland, 395 U.S. 784 (1969); Waller v. Florida, 397 U.S. 387 (1970); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); and Elkins v. United States, 364 U.S. 206 (1960).

facts of this case. Recent state court decisions have explored the question of successive federal-state prosecutions for the same crime and have found the underpinnings of Bartkus and Abbate unconvincing. See People v. Cooper, ___ Mich. ___, 247 N.W.2d 866 (1976); Commonwealth v. Mills, 447 Pa. 168, 286 A.2d 638 (1971); and State v. Fletcher, 22 Ohio App.2d 83, 259 N.E.2d 146 (1970), reversed, 26 Ohio St.2d 221, 271 N.E.2d 567 (1971), cert. denied sub nom., Walker v. Ohio, 404 U.S. 1024 (1972).

The facts are significant here; they eloquently plead the petitioner's case. They serve to demonstrate the fallacy in barring the claim of double jeopardy under the dual sovereignty doctrine. The interests sought to be protected by the federal law are not substantially different than those sought to be protected by the state law. The result of applying the dual sovereignty doctrine in this case is that the interests of the state and federal government are amply protected and the interests of the individual are ignored. The double jeopardy clause was written for the protection of the individual not the state or federal government.

In the instant case around noon on June 11, 1970, the Laddonia State Bank was robbed of approximately $13,000 by two armed robbers wearing stocking masks. The first robber forced a bank employee to fill a sack with money from the cash drawer, while the second robber covered him from the lobby. After

three bank employees tentatively identified the petitioner as strongly resembling the second robber, the FBI arrested him. A federal grand jury indicted the petitioner with robbing the Laddonia State Bank in violation of 18 U.S.C. § 2113(a) and (d).

At the trial four bank employees identified petitioner as the second robber. Two other witnesses placed petitioner in Laddonia the day and morning before the robbery. Three defense witnesses testified that petitioner was in St. Louis the day of the robbery. The alibi was supported by documentary evidence. The federal jury acquitted petitioner. He was subsequently arrested on a state charge of robbery. Mo. Rev. Stat. §§ 560.120 and 560.135 (1969). At the state trial the same six witnesses identified the petitioner and the three defense witnesses testified that the petitioner was in St. Louis the day of the robbery. The same documentary proof corroborating petitioner's alibi was given. The state jury found the petitioner guilty.

In Commonwealth v. Mills, 447 Pa. 168, 286 A.2d 638, 641 (1971), the court barred successive federal-state prosecutions for bank robbery stating:

> It appears to us that the only penological justification for permitting a second prosecution and punishment for the same offense even where different sovereigns are involved is out and out punishment, and we certainly hope that

> at this late date in the history of the development of the penal system of this Commonwealth and the Nation, that incarceration for a criminal act stands on stronger footing than -- an eye for an eye.[2]

The court in Mills perceived that the underlying rationale of Bartkus was federalism -- the need to maintain strong state as well as federal systems of justice. This concern arises from a fear that without recognition of the dual sovereignty doctrine either the state or federal government could prevent the effective administration of justice by the other.[3]

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[2] It should be noted that the Supreme Court of Pennsylvania has recently limited its decision in Commonwealth v. Mills, 447 Pa. 168, 286 A.2d 638 (1971). In Commonwealth v. Studebaker, ___ Pa. ___, 362 A.2d 336 (1976), the court limited the Mills approach to successive prosecutions for the "same offense" and refused to expand the doctrine of collateral estoppel beyond the "same parties."

[3] For law review articles discussing the federalism basis of the dual sovereignty doctrine see Brant, Overruling Bartkus and Abbate: A New Standard for Double Jeopardy, 11 Washburn L.J. 188 (1972); Schaefer, Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe, 58 Calif. L. Rev. 391 (1970); Fisher, Double Prosecution by State and Federal Governments: Another Exercise in Federalism, 80 Harv. L. Rev. 1538 (1967).

In his dissenting opinion in Bartkus, supra, 359 U.S. at 155-58, Justice Black soundly criticized this argument:

> The Court, without denying the almost universal abhorrence of such double prosecutions, nevertheless justifies the practice here in the name of "federalism." This, it seems to me, is a misuse and desecration of the concept. Our Federal Union was conceived and created "to establish Justice" and to "secure the Blessings of Liberty," not to destroy any of the bulwarks on which both freedom and justice depend. We should, therefore, be suspicious of any supposed "requirements" of "federalism" which result in obliterating ancient safeguards. I have been shown nothing in the history of our Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and Nation were to be lost through the combined operations of the two governments. Nor has the Court given any sound reason for thinking that the successful operation of our dual system of government depends in the slightest on the power to try people twice for the same act.
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> . . . .
>
> Ultimately the Court's reliance on federalism amounts to no more than

> the notion that, somehow, one act becomes two because two jurisdictions are involved. Hawkins, in his Pleas of the Crown, long ago disposed of a similar contention made to justify two trials for the same offense by different counties as "a mere Fiction or Construction of Law, which shall hardly take Place against a Maxim made in Favour of Life." It was discarded as a dangerous fiction then, it should be discarded as a dangerous fiction now.

Where the interests of the state and federal governments coincide in the prosecution of a criminal act, as they do here, the federalism rationale is completely unavailing. When this occurs the accomodation of the interest of the individual should be paramount.

I find the examination of the problem by the Supreme Court of Michigan in People v. Cooper, supra, to be determinative. In analyzing whether the federal prosecution for robbing a federally insured state bank "sufficiently protects" the state's interest in prosecuting the robbery, the Supreme Court of Michigan listed these factors, "whether the maximum penalties of the statutes involved are greatly disparate, whether some reason exists why one jurisdiction cannot be entrusted to vindicate fully another jurisdiction's interest in securing a conviction, and whether the difference in the statutes are merely jurisdictional or are more substantive." 247 N.W.2d at 871.

The State of Missouri argues that even if the Mills and Cooper rationale was adopted that it would not be applicable in this case since the state and federal governments did not share the same interest when they prosecuted the petitioner. Missuori asserts that the federal government's interest in a prosecution under 18 U.S.C. § 2113 is to insure that "the integrity of the federal banking system is preserved," whereas the state's interest is to protect its citizens "from violence and to insure that their money is not lost." This argument misconceives the rationale of Mills and Cooper. The focus is not whether the interests are similar, but whether they are so "substantially different" that a prosecution by the federal government would not "sufficiently protect" the state's interest. Moreover the laws of both jurisdictions are not dissimilar as both seek to insure the safety of persons and protect private property. Cooper, supra, 247 N.W.2d at 871.

Missouri additionally argues that the disparity of the penalties between the state and federal statutes is such that it cannot be said that a federal prosecution sufficiently protects the state's interest. The maximum penalty for first degree robbery, Mo. Rev.Stat. §560.135, is life imprisonment, while the maximum penalty under § 2113(d) is 25 years imprisonment. The standard under Cooper is whether the maximum penalties are "greatly disparate." I do not find the disparity between these penalties to be great when considering the crime -- bank robbery.

As an intermediate appellate judge I realize it is not my singular role to express opinion contrary to established law. However, recognition of this judicial discipline should not prevent one from expressing dismay in the use of stare decisis to perpetuate an injustice.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

ORDER OF THE UNITED STATES COURT OF APPEALS, DENYING PETITION FOR REHEARING

United States Court of Appeals
For The Eighth Circuit

76-1538 September Term,1977

Ernest Turley, Appellant,	)	Appeal from the United States District
vs.	)	Court for the Eastern
Donald Wyrick, Appellee.	)	District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

Judge Heaney would grant the rehearing.

Judge Bright agrees with the views expressed in Judge Lay's concurring opinion.

May 16, 1977

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Ernest TURLEY, Petitioner,
v.
Donald WYRICK, Warden, etc.
Respondent.
No. 76-130C(2).
United States District Court,
E.D. Missouri, E.D.

April 5, 1976

Eugene H. Buder, St. Louis, Mo., for petitioner.

John C. Danforth, Atty. Gen., Jefferson City, for respondent.

MEMORANDUM AND ORDER

REGAN, District Judge.

This habeas corpus proceeding presents the narrow issue of whether the double jeopardy prohibition of the Fifth Amendment precludes a state prosecution of a defendant who has previously been acquitted of the same robbery in a federal court.

Upon trial to a jury in this Court, petitioner was found not guilty of the armed robbery of the Laddonia State Bank, the deposits of which were insured by the

F.D.I.C., in violation of Section 2113(a) and (d). Shortly after the acquittal, the prosecuting attorney of Audrain County, Missouri, issued an information charging petitioner with robbery in the first degree by means of a dangerous and deadly weapon, in violation of Missouri statutes. At the trial, the same witnesses who had identified petitioner as the bank robber in the federal prosecution again identified him. Petitioner was found guilty of robbery in the first degree and sentenced to twenty years imprisonment. The Missouri Court of Appeals, St. Louis District, affirmed the conviction. State v. Turley, 518 S.W.2d 207 (Mo.App.1974), cert denied Turley v. Missouri, 421 U.S. 966, 95 S.Ct. 1956, 44 L.Ed.2d 454 (1975). Petitioner having exhausted his available state remedies seeks habeas corpus relief in this Court.

In a factual situation comparable to the present, the Supreme Court held that successive federal and state prosecutions based upon the same acts do not violate the Double Jeopardy Clause. Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684. And cf. Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 6 L.Ed.2d 729. A number of decisions of the Court of Appeals, including the Eighth Circuit have applied this principle where, as here, there is no identity of sovereigns. See, for example, United States v. Synnes, 438 F.2d 764 (8 Cir. 1971); Martin v. Rose, 481 F.2d 658 (6 Cir. 1973), and United States v. Jackson, 470

F.2d 684 (5 Cir. 1972).

Petitioner urges that Bartkus no longer has validity in light of more recent decisions of the Supreme Court such as Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707, Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 and Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1187, 25 L. Ed.2d 469. We do not agree. True, Benton held that the double jeopardy clause of the Fifth Amendment is binding on the states through the Fourteenth Amendment. However, Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 6 L.Ed. 2d 729 decided the same day as Bartkus, explicitly held that the Fifth Amendment did not bar federal prosecution of a defendant who had been prosecuted for the same act by a state.

Waller merely held that "successive municipal and state prosecutions were barred where the elements of the offense were identical," municipalities being subdivisions of the state and not independent sovereigns. Here, there is no identity of sovereignties. Each sovereign may punish an offense denounced by its laws, even though the act committed by the defendant is the same act denounced by the laws of the other sovereign. The offense against Missouri for which petitioner was prosecuted and convicted in the state court is not the same offense as the federal offense of which he was acquitted in this Court merely because

both prosecutions were based on the same acts.

And obviously the doctrine of collateral estoppel has no application. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L. Ed.2d 469 involved successive state prosecutions for the same robbery where only the victim was different. The Supreme Court defined "collateral estoppel" as meaning simply that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit." In Ashe, the second prosecution involved the same parties as the first. Here, the same parties or their privies are not involved.

It follows that petitioner is not entitled to a writ of habeas corpus. Judgment will be entered accordingly.

ORDER OF THE MISSOURI COURT OF APPEALS, DENYING MOTION TO TRANSFER APPEAL TO SUPREME COURT OF MISSOURI

St. Louis, Mo.
December 6, 1974

No. 34965 -- State, Respondent, vs.
Ernest Turley, Appellant.

Appellant's motion to transfer to Supreme Court is denied.

Missouri Court of Appeals
St. Louis District

OPINION OF THE MISSOURI COURT OF APPEALS

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT
SEPTEMBER SESSION, 1974
DIVISION ONE

STATE OF MISSOURI, Plaintiff-Respondent,	)	No. 34965
vs.	)	Appeal from the
ERNEST TURLEY, Defendant-Appellant.	)	Circuit Court Warren County, Missouri

Hon. George P. Adams, Judge
OPINION FILED
November 6, 1974

Defendant was convicted of robbery in the first degree under Section 560.120, RSMo 1969. His punishment under the Second Offender Act (§556-280, RSMo 1969) was assessed at twenty years imprisonment in the custody of the State Department of Corrections. We affirm.

Shortly after noon on June 11, 1970, the Laddonia State Bank was robbed of approximately $13,000 by two armed men wearing stocking masks. One of the robbers herded the employees behind the counter and forced an employee to fill a sack with money from the cash drawers.

The second robber remained in the bank

lobby with gun drawn. The two bandits made a successful getaway. A few hours later police located a burned-out light green 1959 Cadillac about a mile from the bank.

F.B.I. agents, meanwhile, arrived at the bank and showed the four bank employees several photographs of suspects. Three employees stated a photograph of defendant strongly resembled the second robber.

F.B.I. agents arrested defendant in St. Louis on June 24, 1970. No gun or stolen money was found in defendant's possession. On June 26, 1970, two bank employees identified defendant in a St. Louis police lineup. Also identifying defendant at this lineup were two other Laddonia residents. Charles Crow had noticed a green 1959 Cadillac in Laddonia the day before the robbery; he remembered defendant as the driver of the Cadillac. The evening of the robbery Crow identified the burned-out car as the Cadillac he had seen in town the previous day; that same evening he identified defendant from a photograph as the driver of the Cadillac.

The other Laddonia resident present at the lineup was Wanda Garnett, who was working at a grocery store near the bank the day of the robbery. After the robbery she saw defendant's photograph in a local newspaper and recognized him as a man who had purchased cigarettes from her a couple

hours before the robbery.

On July 1, 1970, a federal grand jury charged defendant with robbing the Laddonia State Bank, in violation of 18 U.S.C. §2113(a) and (d). Defendant was acquitted of the federal charge in November 1970, after a trial in which the four bank employees positively identified the defendant as one of the bank robbers. There was other incriminating identification testimony against defendant by Mr. Crow and Ms. Garnett.

On January 4, 1971, the Prosecuting Attorney of Audrain County filed an information charging defendant with robbery in the first degree by means of a dangerous and deadly weapon. §§560.120 and 560.135, RSMo 1969. At the subsequent state trial the same six witnesses again identified the defendant. As said the jury found the defendant guilty of robbery in the first degree and he appeals.

Defendant's first contention on appeal is that his conviction in state court offends the Constitutions of both Missouri and the United States. We pose the question: Can a defendant who is acquitted of a federal charge of bank robbery be subsequently tried and convicted in state court for robbery? The answer is yes.

In 1959, the United States Supreme Court handed down two cases dealing with

successive state and federal prosecutions. One was Abbate v. United States, 359 U.S. 187 (1959), which upheld a federal conviction following a state court acquittal based on substantially the same facts. The other case was Bartkus v. Illinois, 359 U.S. 121 (1959), with basically the same facts as the case before us. Bartkus involved the robbery of a federally insured savings and loan association. Defendant had been acquitted in the federal courts, but convicted in the state court under the Illinois robbery statute. In an opinion by Justice Frankfurter, the Supreme Court held the conviction valid.

In analyzing the history of double jeopardy, the court made note of the early case of Fox v. Ohio, 5 How. 410 (1847), which held that both the federal government and the states have the power to impose criminal sanctions on conduct that offends the laws of each. The court also noted that one of the cases decided prior to Fox v. Ohio was the Missouri case of Mattison v. State, 3 Mo. 421 (1830), which held no plea in bar would prohibit the second prosecution in successive state and federal prosecutions.

In discussing the history since Fox v. Ohio, Justice Frankfurter in Bartkus noted that of the "twenty-eight States which have considered the validity of successive state and federal prosecutions as against a challenge of violation of either a state constitutional double-jeopardy provision

or a common-law evidentiary rule of autrefois acquit and autrefois convict, twenty-seven have refused to rule that the second prosecution was or would be barred." 359 U.S. at 134, 135. Among the cases cited by the court under this point was the Missouri case of Ex parte January, 246 S.W. 241, 295 Mo. 653 (Mo. banc 1922). That case held that both the federal government and Missouri have concurrent jurisdiction to punish conduct which offends the laws of each.

In further explanation of its holding, the court in Bartkus discussed the principle of dual sovereignty: "Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both." 359 U.S. at 131.

Defendant contends that the rule in Bartkus is not the law. He argues that part of the holding in Bartkus was that the Fifth Amendment did not apply to the states and that this position has now been overruled. Defendant relies on Benton v. Maryland, 395 U.S. 784 (1969). Benton involved successive state prosecutions. Benton held that the double jeopardy prohibition of the Fifth Amendment applies to the states through the Fourteenth Amendment. Benton did not overturn the dual sovereignty

principle as reaffirmed in Bartkus and subsequently followed in other federal cases.

The question defendant specifically poses is does Benton overrule Bartkus v. Illinois? The answer to that question is that Bartkus is still the law today. Defendant's same argument was raised and rejected in the case of Martin v. Rose, 481 F.2d 658 (6th Cir.), cert. denied, 414 U.S. 876 (1973), wherein the court held: "Appellant urges that Bartkus no longer has continuing validity, particularly in view of such cases as Benton v. Maryland,... We do not, however, read Benton as rejecting the result of Bartkus." 481 F.2d at 659.[1]

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[1] see Footnote #2 in Martin v. Rose, supra, at page 660: "We note further that the United States Supreme Court has recently denied certiorari in several cases questioning the application of the dual sovereignty doctrine to consecutive federal and state prosecutions. Bechtel v. New Jersey, cert. denied, 404 U.S. 831, 92 S.Ct. 72, 30 L.Ed. 2d 61 (1971); Colonial Pipeline Co. v. New Jersey, cert. denied, 404 U.S. 831, 111; Feldman v. New Jersey, cert. denied, 404 U.S. 865, 92 S.Ct. 76, 30 L.Ed.2d (1971); Jacks v. New Jersey, ...; Leuty v. New Jersey, cert. denied, 404 U.S. 865 ...."

The court in Martin further stated: "we find that the Federal courts still recognize and affirm the continuing validity of Bartkus."[2] 481 F.2d 660, citing as an example, our own Eighth Circuit in United States v. Synnes, 438 F.2d 764 (8th Cir. 1971), where, after upholding the validity of Bartkus and Abbate, held that the defense of Double Jeopardy does not bar successive prosecutions where there is no identity of sovereigns.[3]

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[2] Citing United States v. Jackson, 470 F.2d 684, (5th Cir. 1972); United States v. Canty, 469 F.2d 114 (D.C. Cir. 1972); United States v. Crosson, 462 F.2d 96 (9th Cir. 1972); Goldsmith v. Cheney, 447 F.2d 624 (10th Cir. 1971); United States v. Smith, 446 F.2d 200 (4th Cir. 1971); United States v. Synnes, 438 F.2d 764 (8th Cir. 1971).

[3] In Synnes, written by Judge Heaney, the defendant had been convicted in the federal court of possessing a firearm. The defendant had been previously convicted under a Minneapolis city ordinance for possession of a firearm. The evidence on which the convictions were based was identical. Defendant argues that the Minneapolis city court conviction bars the federal prosecution under the double jeopardy provision of the Fifth Amendment. The Court answered this argument as follows(page 773): "It is conceded by the government that the defendant's violation of the city ordinance resulted from the same

FN[3] continued:

conduct involved here and that the elements of proof in the two cases are identical.[12]

"However, the government contends, and we agree, that the defense of double jeopardy does not bar successive prosecutions where, as here, there is no identity of sovereigns. We believe the decision of the Supreme Court in United States v. Lanza, 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314 (1922), specifically reaffirmed by Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959), compels this result. See also, Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed. 2d 684 (1959); United States v. Feinberg, 383 F.2d 60 (2nd Cir. 1967).

"The defendant suggests that Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L. Ed.2d 435 (1970), indicates a rejection, or at least a weakening, of the "dual sovereign" concept. We doubt that it does. Waller decided only that successive municipal and state prosecutions were barred where the elements of the offense were identical. The Court reasoned that Florida municipalities were subdivisions of the State and not independent sovereigns." Synnes was vacated and remanded on other grounds, 404 U.S. 1009(1972).

Our conclusion: Bartkus has continuing validity; defendant's conviction is not unconstitutional.

Defendant next contends that the trial court erred in allowing certain statements to be made by the prosecuting attorney in his final argument. Defendant made no objection at the time the statements were made. The remarks complained of are as follows:

> "Now, under our rules the jurors may take photographs into the jury room under certain conditions. I would be willing and agree that you may take these photographs into the jury room look at them yourselves; if the defense stands up and says they do not agree that you can take the photographs and look at them yourselves, then I feel sure that Judge Adams would permit you, if you requested the photographs, to do that. Nobody is going to force any photographs on you, but on behalf of the State I ask you to request these photographs and look at them..."

During its deliberations the jury asked to have the photographs sent to the jury room. At that time the trial court, out of the hearing of the jury, asked if defendant had any objection to sending the photographs to the jury. The photographs had

previously been introduced into evidence and had been examined by the jury.[4] Defendant answered that the earlier comments by the prosecuting attorney constituted an improper invitation to the jury. Defendant's attorney was of the opinion that the statement inferred that the jury could have the photographs unless the defendant objected. Defendant moved for a mistrial, which was denied. Thereupon the court sent all the photographs to the jury.

We note initially that defendant made no objection to the prosecutor's statements at the time they were made. Objections to arguments by the State are required to be made at the time the objectionable statement is made or nothing is preserved for review. State v. Williams, 419 S.W.2d 49, 53 (Mo. 1967); State v. Martin, 484 S.W.2d 179, 180 (Mo. 1972).

However, even if the point had been preserved for review it is without merit. Furthermore, the granting or withholding of a new trial for improper argument is a matter for trial court's discretion. State v. Williams. supra, at 50. An appellate

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[4] The photographs in question showed a line-up in which defendant appeared. One showed a group of men with stockings over their heads and the other showed the same group without the stockings.

court will not interfere with a ruling by the trial court unless the record shows that the trial court abused its discretion to the prejudice of appellant. State v. Hutchinson, 458 S.W.2d 553, 556 (Mo. banc 1970). Such statements must have been plainly unwarranted and clearly injurious. State v. Hutchinson, supra.

We have examined the record and do not find the prosecutor's comments to be so injurious as to warrant a finding of abuse of discretion by trial court in denying a mistrial. Defendant argues that the prosecuting attorney told the jury that they could have the photographs unless the defendant objected. On the contrary, the prosecutor said that the jury may only have photographs under certain conditions, and that if defendant objected, he felt sure that Judge Adams would permit the jury to look at them. This is not a case where the prosecutor told the jury that they had an absolute right to take exhibits to the jury room (thus distinguishing State v. Arrington, 375 S.W.2d 186 (Mo. 1964)). We believe, contrary to defendant's contention, that the jury did not understand that they could have the exhibits unless the defendant objected, but rather, that it was within the discretion of the trial court. While we do not approve of the remarks by the prosecuting attorney, we cannot say they are so injurious that the trial court abused its discretion in denying defendant's motion for a mistrial. State v. McCreary, 504 S.W.2d 132 (Mo. App. 1973).

Defendant's third contention on appeal concerns Instruction No. 4, which reads as follows:

"INSTRUCTION NO. 4"

"All persons are equally guilty who act knowlingly (sic) together with a common intent in the commission of an offense, and an offense so committed jointly by two or more persons is the act of each and all, and whatever any does in furtherance of the unlawful act is in law the deed of each of such persons.

"If you find and believe from the evidence beyond a reasonable doubt:

"First, that on the 11th day of June, 1970, in the County of Audrain, State of Missouri, Ruby Hamlett, Freida Spradling and Frances Sutter were Laddonia State Bank employees who were in charge of a sum of money, and

"Second, that at that time and place mentioned in evidence the defendant Ernest Turley acting jointly with another took some of the money in the presence of Ruby Hamlett, Freida Spradling and Frances Sutter against the will of any one of them by putting that one in fear of immediate injury to her person, and

"Third, that the defendant acting jointly with another took the money with the intent to permanently deprive the owner, the Laddonia State Bank, and its employees of their right to the money and to convert it or any part of it to defendant's own use or the use of the person acting jointly with the defendant, then you will find the defendant guilty of robbery in the first degree.

"However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty of that offense." (Emphasis added).

Defendant urges that the word "any" in the first paragraph was "subject to misinterpretation" by the jury. He contends that the instruction would have been saved from confusion by adding the words "co-conspirator or co-defendant or accomplice" to that part of the instruction, so that the instruction would read "... and whatever any co-conspirator or co-defendant or accomplice does in furtherance of the unlawful act is in law the deed of each such persons."

We do not agree that the instruction was confusing as given. Our close examination of the instruction convinces us that

the instruction was clear and not subject to misunderstanding by the jury. Furthermore, the first paragraph of the instruction was approved in State v. Washington, 364 S.W.2d 572 [9] (Mo. 1963), with the only difference being that the word used in Washington was "either" instead of "any." It is also noted that the paragraph complained of by defendant closely parallels the language of MAI-Cr 2.10 which was not in effect at the time of the trial below.[5] The contention is without merit.

Defendant also challenges the instruction for failing to require a finding on the use of a dangerous and deadly weapon, contrary to the indictment which charged defendant with such use. Defendant does not argue that the instruction has to follow the exact language in the indictment, for it is well settled that a personcan be charged by indictment with the more serious offense and convicted of a lesser included offense such as here -- robbery in the first degree. Keeny v. State, 461 S.W.2d 731, 732 (Mo. 1971). "The defendant cannot complaint of the giving of an instruction on a lesser

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[5] MAI-Cr 2.10 was not made effective until January 1, 1974. The only difference between the complained of language and the MAI-Cr 2.10 instruction is that the word "one" is used in place of "any".

grade of an offense although the evidence tends to show guilt, if at all, of a higher grade." State v. Cox, 508 S.W.2d 716, 723-724 (Mo. App. 1974).

What defendant does argue is that in fixing sentence, the trial court could not have known whether the jury either found the presence of the deadly weapon, or not. The trial court expressly fixed the sentence pursuant to the jury's verdict of guilty to the instructed charge of robbery in the first degree and entered the sentence in accordance with the instruction and the jury's verdict. This in no way prejudices defendant, but on the contrary, removes the possibility of being either convicted or sentenced on the more serious crime.

Defendant's final contention charges that the trial court erred in overruling his motion for directed verdict for the reason that his alibi testimony placed him in St. Louis at the time of the robbery. This contention is without merit. This is not a contention that the evidence was insufficient to support a conviction but rather a contention that the judge was required to believe the alibi witnesses. Not so. Here there were four witnesses who identified the defendant as one of the bank robbers. Two other witnesses also gave incriminating identification testimony. Therefore, it is clear that the state's evidence was sufficient to support the verdict. The credibility of the witnesses

is for the jury. State v. Bizzle, 500 S.W. 2d 259, 261 (Mo.App. 1973). The jury here disbelieved the alibi witnesses.

We need only add that in cases where there are two diametrically opposed theories presented in the case and where the facts and the evidence are in conflict, the matter is one for the jury to determine. State v. Nolan, 499 S.W.2d 240, 250 (Mo. App. 1973).

No reversible error being shown, the judgment is affirmed.

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Robert G. Dowd, Chief Judge

Joseph J. Simeone (Judge) Concurs

Harry L.C. Weier (Judge) Concurs

John J. Kelly, Jr. (Judge) Concurs